No. 83349-4

SUPREME COURT
OF THE STATE OF WASHINGTON



KEMPER FREEMAN, JIM HORN, STEVE STIVALA, KEN COLLINS, MICHAEL DUNMIRE, SARAH RINDLAUB, AL DEATLEY, JIM COLES, BRYAN BOEHM, and EASTSIDE TRANSPORTATION ASSOCIATION, a Washington nonprofit corporation,

Petitioners,

v.

CHRISTINE O. GREGOIRE, a state officer in her capacity as Governor of the State of Washington, and PAULA J. HAMMOND, a state officer in her capacity as Secretary of the Washington State Department of Transportation,

Respondents,

and

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,

Intervenor.

# REPLY BRIEF OF PETITIONERS

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## A. INTRODUCTION

The briefs of respondents Sound Transit and Christine Gregoire and Paula Hammond ("WSDOT") are remarkable for their misrepresentations of the petitioners' arguments and their willingness to ignore the mandate of article II, § 40 (the 18th Amendment) of Washington's Constitution.

In their briefs, Sound Transit and DOR set up strawman mischaracterizations of the petitioners' arguments so that they can claim a writ should not issue here. Moreover, WSDOT now *abandons* its former contention, offered to support denial of a writ, that the transfer of the two center lanes of Interstate 90 will not necessarily take place.

Sounds Transit and DOR *admit* that rail transportation is not a highway purpose under the 18th Amendment, but then ignore this Court's decisions on the consequences of spending funds from the Motor Vehicle Fund ("MVF") on non-highway purposes.

They offer a sleight of hand that although the MVF cannot be spent on rail transportation, WSDOT may, at its whim, simply ignore the 18th Amendment and statutes pertaining to the lease of surplus highway properties, and lease facilities built by MVF moneys to whomever it chooses so long as "consideration" is received for the lease. In effect, Sound Transit and DOT argue that they are above the 18th Amendment

(and above the specific statutes addressing leasing of MVF-funded facilities).

This Court should reject the agencies' arguments, which would eviscerate the anti-diversionary policy of the 18th Amendment, allowing bureaucrats to ignore the 18th Amendment whenever they wish and threaten the continued vitality of our state's highway system, which the 18th Amendment was enacted to protect.

B. RESPONSE TO WSDOT/SOUND TRANSIT STATEMENTS OF THE CASE

While both WSDOT and Sound Transit go into great detail regarding irrelevant and unsupported "facts" in their reply briefs, the basic facts at issue in this case, however, are conceded by all parties:

1. Interstate 90 was constructed at least in part with funds from the MVF.

2. The Legislature appropriated funds from the MVF, created by the 18th Amendment, for valuation of the Interstate 90 center lanes.

3. WSDOT and Sound Transit completed negotiations regarding the consideration to be paid by Sound Transit for exclusive use of the Interstate 90 center lanes.

4. WSDOT will transfer the two center lanes of Interstate 90 to Sound Transit for exclusive light rail use, specifically the East Link Light Rail project, to the exclusion of all buses, HOVs, vanpools, and Mercer Island vehicular traffic.

5. The 2004 amendment to the 1976 Memorandum of Agreement ("MOA") committed WSDOT to transfer the two center lanes of Interstate 90 to Sound Transit, as Governor Gregoire's July 13,

2006 letter to Sound Transit and the WSDOT-Sound Transit Term Sheet confirm.

6. Light rail[1] is not a highway purpose under the 18th Amendment.

Both WSDOT and Sound Transit assert that the Interstate 90 center lanes, since their initial conception, have been permanently designated for exclusive light rail use. WSDOT br. at 35-36; Sound Transit br. at 5-9.[2] The agencies offer a revisionist history. In fact, the center lanes were never committed to light rail use. The 1976 MOA stated that the center lanes were to be used for transit, carpool, and Mercer Island traffic use on

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[1] As might be expected, Sound Transit takes issue with the petitioners' assertion in their brief at 7 n.6 that light rail's expenses have exceeded initial projections and its ridership has been underwhelming. Sound Transit br. at 21 n.16. Sound Transit is not entirely candid with this Court about light rail's cost and ridership, limiting the baseline for ridership and cost to its *2001 projections*. *Id.* Sound Transit does not deny that when compared to its 1996 projections, when light rail was first offered to the voters in its Sound Move ballot measure, Sound Transit has delivered a truncated line, at greater cost, serving fewer riders. In fact, emblematic of Sound Transit's inflated promises is the statement of Dave Earling, Sound Transit's board chairman in a September 2000 magazine article:

> When the Link light rail system opens in 2006, its ridership is projected to be immediately higher than just about any other light rail system in the nation. By the end of this decade [2010], more than 125,000 passengers will ride it every day ... Those numbers weren't pulled out of thin air to sound impressive.

David Earling, *Why Rail Works*, Open Spaces Quarterly, Vol. 3, No. 3, 2000, available at http://www.open-spaces.com/article-v3n3-earling.php.

[2] Sound Transit implies in its brief at 5 that the petitioners challenge is somehow "tardy" because the decision to have light rail on Interstate 90 was made "decades" ago. This argument flies in the face of WSDOT's argument in its memorandum in support of its motion to dismiss that petitioners' action was "premature" because *no transfer decision had been made,* Mem. at 8-9.

either a reversible or two-way directional mode. AF 5, Ex. A at 4.[3] While the lanes were to be "designed for and permanently committed to transit use," the MOA never restricted or defined transit use as exclusive light rail use, let alone committed the transit lanes to light rail. *Id.* at 5. The only reference made to rail was the statement that the Interstate 90 be designed and constructed so that conversion of all or part of the transit lanes to fixed guideway might be "possible" at some unspecified future date. In no way does the MOA commit the center lanes to permanent and exclusive light rail use to the exclusion of all motor vehicle traffic. Furthermore, the lanes were not restricted exclusively to "transit use" either, considering their commitment to buses, HOVs, carpools and general Mercer Island traffic as well. Since the completion of the Interstate 90 center lanes, their use has been restricted to high occupancy vehicles, including buses,

[3] Both WSDOT and Sound Transit contend that the 1976 MOA was negotiated under the authority of RCW 47.52. WSDOT br. at 4-5; Sound Transit br. at 2, 4, 5, 7, 9, 23. Sound Transit is particularly aggressive in claiming that the Legislature authorized or approved the MOA. Both agencies vastly overstate their argument. First, the 1976 MOA nowhere even mentions RCW 47.52. AF 5, Ex. A. Second, a careful review of the history of Interstate 90 negotiations in *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980) indicates that the statutory board of review process for Interstate 90 culminated *before* the 1976 MOA. *Id.* at 743. The Legislature's enactment of RCW 47.52.180 or RCW 47.20.645/RCW 47.20.647 did not provide for legislative "approval" of the 1976 MOA. RCW 47.52.180 simply said that the parties to a WSDOT plan approved by a board of review may be amended by all the parties to it. RCW 47.20.645 and .647 established deadlines to finish Interstate 90. Contrary to Sound Transit's assertion in its brief at 23 n.16, these statutes *nowhere* evidenced an intent to override the statutes pertaining to sale or lease of WSDOT property.

carpools, vanpool, and to general traffic traveling to or from Mercer Island. AF 11.[4]

Additionally, Secretary Brock Adams' approval of federal funding was conditioned on the agreement that "public transportation" have first priority use of the center lanes. AF 6, Ex. B. But *nowhere* in the Secretary's Decision is there a reference to rail, nor is public transportation defined as rail use. *Id.*, Ex. B at 6.

Further, the 2002 FEIS and Record of Decision on the Interstate 405 corridor, which included significant portions of Interstate 90 from Mercer Island east, specifically rejected light rail as high capacity transit in favor of a bus rapid transit ("BRT") alternative. BRT buses were to operate in HOV lanes like the center lanes of Interstate 90. http://www.wsdot.wa.gov/Projects/I405/corridor/library/feistoc.htm (FEIS); http://www.wsdot.wa.gov/NR/rdonlyres/AC2D34D8-43AA-4760-92B8-DF85ED190AA/0/1405_RecordOfDecision_Final.pdf (Record of Decision).[5]

[4] The dedication of the center lanes to exclusive light rail use would, in fact, displace all forms of public highway transportation, as the lanes would be lost to buses and other high occupancy vehicles.

[5] The 2002 Interstate 405 corridor decision contradicts the agencies' argument that light rail was always the intent of decisionmakers for the Interstate 90 center lanes.

Both WSDOT and Sound Transit also state the Record of Decision for the R8-A alternative, AF 17, provides authority for the conversion of the center lanes to exclusive light rail use. WSDOT br. at 5; Sound Transit br. at 13-14. In fact, R8-A specifically provides that it will "retain the existing reversible operations in the center roadway..." Record of Decision at 9. Sound Transit implies that by referring to "high capacity transit" as being the ultimate configuration for the center roadway, R8-A indicates that light rail is the exclusive means of delivering transit services. That is not so.

While the 2004 Amendment to the 1976 MOA refers to light rail as the "ultimate configuration," R8-A not only does not set forth rail as the preferred method, it makes absolutely no reference to light rail on Interstate 90 at all.[6] The main reason for the selection of R8-A as the preferred alternative was the reduction in congestion and travel times. The Records of Decision compares reductions in travel times in the Interstate 90 corridor between R8-A and the No Build Alternative through 2025, finding:[7]

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[6] The July 23, 2008 letter of Joni Earl, Sound Transit's CEO to Paula Hammond, Secretary of WSDOT, indicates at 3 that the two agencies agreed to light rail, apart from the R8-A: "WSDOT and ST now agree that the HCT mode will be light rail (East Link) and therefore R8A must be construed in order to implement light rail." http://www.wsdot.wa.gov/partners/erp/ltr_sec_hammond072308.pdf.

[7] Similarly, the R8-A report stated:

> Alternative R8-A would have the greatest reduction in person hours of travel of all alternatives, a reduction of 15% in year 2015 and 35% in year 2025, as compared to the No Build Alternative.

Record of Decision at 11. By eliminating the center lanes of Interstate 90, the congestion reduction goal of R8-A is defeated.[8]

Both WSDOT and Sound Transit allude to the voters' decision on Proposition 1 in 2008. WSDOT br. at 6-7; Sound Transit br. at 13-15. Both agencies ignore the fact that voters turned down an expansive tax measure in 2007.[9] The voters only approved funding, not a specific light rail plan. AF 23. Contrary to Sound Transit's claim in its brief at 15, there was no vote on the transfer of the center lanes of Interstate 90 for exclusive transit use. *Id.* Also, the voters in the November 2008 ballot proposition were from parts of King, Pierce, and Snohomish Counties, not

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> Alternative R-8A would reduce the existing approximately 8 hours of congestion to less than 2 hours (remaining at less than 2 hours by year 2025) unlike the other alternatives which maintain or increase hours of congestion as compared to the No Build Alternative.

Record of Decision at 11.

[8] Alternative R8-A contemplates the addition of two lanes to Interstate 90 for a total of ten with all of those lanes being available for vehicular traffic at least through 2025 for maximum congestion relief. Had the Record of Decision intended the center roadway to be dedicated exclusively to light rail, the analysis of congestion reduction would be drastically different. The 2004 Amendment is, in fact, contrary to the R8-A configuration approved by the Federal Highway Commission, and would defeat the congestion-reduction purpose of R8-A.

[9] Similarly, the voters rejected the financing measure for Sound Transit in the spring of 1995 only to approve it in the fall of 1996.

state-wide. While Interstate 90 is a highway of *state-wide* significance pursuant to RCW 47.06.140, AF 1, the decision to transfer the center lanes of Interstate 90 was not agreed upon by the voters of the entire State, but only a limited number of Puget Sound region voters. Thus, not all citizens of Washington who use or benefit by Interstate 90 agreed to the use of the center lanes for exclusive light rail. By contrast, voters state-wide approved the 18th Amendment.[10]

Finally, Sound Transit asserts that it has agreed to pay "just compensation" for the exclusive of the center lanes for Interstate 90. Sound Transit br. at 16-21. This is not an "agreed fact," but merely Sound Transit's *argument.* AF at p. 1-2. The parties have only agreed that at least $250,000 of MVF monies were spent for an "analysis of methodologies to value the reversible lanes on Interstate 90" as appropriated by the Legislature. AF 30, Ex. G at 7 (ESSB 5352, Laws of 2009, ch. 470, § 204(3)).

The appraisal report is nothing more than an opinion untested in court and not a fact. Its authors have not been subjected to examination, nor its conclusions tested in court. Petitioners do not agree or concede that valuation methodology adopted by the consultants hired by Sound Transit

[10] Even if voters approved of the transfer of the Interstate 90 center lanes to Sound transit for light rail such approval would violate the 18th Amendment and must be set aside.

and WSDOT is appropriate. Nor do petitioners agree that the valuations of the land or the State's fee interest determined by the appraiser are either correct or just. Moreover, the puny valuation is counterintuitive. For example, the valuation of Interstate 90 was restricted only to the portion of the highway paid from the MVF monies – the approximately 15 percent of the total cost of the facility. In other words, the report values the Interstate 90 center lanes at the original MVF contribution, less depreciation over time.[11] This bears *no relationship* to the true value of the two center lanes. The true evaluation must take into account such real world factors as what it would cost to replace two lanes on Interstate 90 today.[12] Without the 90-10 federal match available when Interstate 90 was initially constructed, Washington taxpayers would bear the *entire* cost to replace the center lanes.

C. ARGUMENT

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[11] Interstate 90 is an asset that has *appreciated* greatly in value because of the difficulty inherent in its replacement such as right of way acquisition, environmental review, community opposition, and the like.

[12] Indeed, if Sound Transit were to acquire the right of way, and build two lanes parallel to Interstate 90 for light rail, it is quite obvious the cost would *far exceed* $70 million. The estimated cost of two lanes for SR 520, exclusive of right of way or plan approval costs, is $2.62 billion. http://www.wsdot.wa.gov/partners/sr520legislativework group/files/opta+costmap.pdf. The references in the briefs of WSDOT and Sound Transit to the intended expenditures to increase the number of lanes on Interstate 90 to ten, even though this is not an agreed fact as to the amounts at issue, AF at p. 2, is also revealing. Far from requiring substantial construction, to essentially add some ramps and restripe the existing roadway, the cost is in the tens of millions. AF 19-21.

(1) This Court Has the Authority to Issue a Writ of Mandamus or Prohibition and Should Do So Here[13]

(a) The WSDOT/Sound Transit Mischaracterizations of Petitioners' Claims Should Be Disregarded

WSDOT and Sound Transit set up straw man arguments regarding the nature of the petitioners' original complaint and the relief sought in it, in order to establish procedural grounds to evade responsibility for their unconstitutional conduct. The Court should see through these transparent contentions and focus on what is really at stake here – WSDOT wants to transfer the two center lanes of Interstate 90, built with MVF money, to Sound Transit for a non-highway purpose under the 18th Amendment. Similarly, they want to expend MVF money in the 2009 transportation budget to facilitate the transfer of the Interstate 90 center lanes, again, a non-highway purpose under the Washington Constitution.

To facilitate their argument that the Court should not exercise its original jurisdiction and issue a writ to bar them from engaging in

[13] Both WSDOT and Sound Transit refer to the Commissioner's ruling in connection with the petitioners' motion for stay as legal authority in connection with their arguments on the law here. *See* WSDOT br. at 26; Sound Transit br. at 22-23. This is *highly improper* under GR 14.1 and worthy of sanctions under RAP 18.9. A Commissioner's ruling is an unpublished interlocutory ruling that clearly is not a published opinion of this Court. GR 14.1. Experienced counsel like those for WSDOT and Sound Transit know that. The Commissioner's ruling related to a stay issue in any event. Petitioners succeeded in that ruling in having both agencies effectively admit they would take no actions and spend no funds to convert Interstate 90's center lanes to light rail during the pendency of this case. The Commissioner's statements on the law in his ruling would be "dicta," were his ruling precedential.

unconstitutional actions, both WSDOT and Sound Transit mischaracterize the petitioners' original petition, and WSDOT aggressively asserts that the arguments raised in petitioners' opening brief are "new." WSDOT br. at 24-30. Sound Transit largely echoes WSDOT's procedural argument, going so far as to claim that the petitioners seek to undo various local government actions. Sound Transit br. at 26.[14] These arguments are, quite frankly, nonsense, and this Court should disregard them.[15]

The petitioners specifically pleaded that light rail was not a highway purpose, Pet. at ¶ 2.22, and WSDOT was proposing to expend MVF moneys for the development of appraisal methodologies to facilitate the transfer. Pet. at ¶ 2.26. The petitioners' theory of the case could not

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[14] Sound Transit's hysterical argument that the petitioners seek to undo the 1976 MOA, the 2004 Amendment, or Proposition 1 in 2008 is plainly untrue. The petitioners seek to prevent the transfer of the Interstate 90 center lanes, built with MVF moneys to Sound Transit. All of the referenced decisions are unaffected. Petitioners merely seek to uphold the *mandatory* directive of the 18th Amendment that MVF funds cannot be used to facilitate a non-highway purpose. To the extent that any of those decisions purport to facilitate a non-highway purpose with MVF moneys, *our Constitution controls*.

[15] Sound Transit's motion to intervene in this case clearly articulated what the petitioners were seeking in their petition:

> Petitioners challenge the facial constitutionality of ESSB 5352. Specifically, Petitioners allege that article II, section 40 of the Washington Constitution prohibits the State from "taking any action pursuant to ESSB 5352 with respect to the sale or lease of any portion of I-90 to Sound Transit for the purpose of a rail transit system...." Petition at 14. Petitioners request a writ restraining the Governor and the Secretary of the Washington State Department of Transportation ("WSDOT") from "taking or authorizing any action with respect to the sale, lease or occupancy of any portion of Interstate 90 to Sound Transit for the purpose of a railway system." Petition at 16.

Motion to intervene at 3.

be clearer when they stated that they sought to prohibit the Governor or WSDOT from taking *any action* to sell or lease of any portion of I-90 to Sound Transit for the purpose of a rail transit system. Pet. at ¶ 3.1. *See also, id.* at ¶¶ 4.1, 4.2.

There is a certain irony in both WSDOT's and Sound Transit's arguments. At the same time WSDOT accuses the petitioners of offering "new arguments," WSDOT's position in the case has morphed rather dramatically. WSDOT filed a memorandum seeking dismissal of the petitioners' claims, contending that the present dispute was not "justiciable" because it was under no duty to sell or lease the two center lanes of Interstate 90. Mem. at 8-9. It asserted that

> any sale or lease "that may be executed in the future will depend on all of the terms and conditions of the transaction, and all of the facts and circumstances then surrounding the light rail project. Those terms, facts, and circumstances can only be assessed at the time such a transaction is to be undertaken. Any challenge at this point would be speculative and premature, and for this additional reason, nonjusticiable."

*Id.* WSDOT has *abandoned* this argument that a sale or lease is "premature." It is belied by the Term Sheet negotiated by WSDOT and Sound Transit in any event.

Moreover, what WSDOT claims is a "new" argument by petitioners, the authority of WSDOT to evade the 18th Amendment by

selling or leasing a facility built with MVF moneys, *was first raised by WSDOT itself.* Mem. at 14-15. Petitioners were clearly entitled to anticipate and respond to an argument WSDOT raised, and continues to raise, in this case.

Both WSDOT and Sound Transit note that the petitioners' petition initially referenced a writ of prohibition. WSDOT br. at 15-16; Sound Transit br. at 21-22. They try to argue that petitioners have "changed" the remedies they seek and that should somehow justify dismissal of the petition. Again, this issue came up before in the case in the context of WSDOT's motion to dismiss the petition. In their reply to the motion to dismiss, the petitioners made clear the nature of the relief they sought:

> The State attempts to obfuscate the issue by alleging that the proper remedy in this case would be termed a writ of mandamus as opposed to a writ of prohibition. This argument is one of semantics and is not determinative of the justiciability of this matter. The petitioner makes clear that the relief sought is the prohibition of a mandatory duty of a state officer. Either a writ of mandamus or a writ of prohibition would grant this relief.

Reply at 6-7. In effect, the petitioners have made clear that they seek a writ of prohibition or a writ of mandamus. That this Court's December 4, 2009 order retained the petitioner strongly implies the WSDOT's hypertechnical concern regarding a writ of mandamus or writ of prohibition was rejected by the Court.

(b) A Writ of Prohibition Is Appropriate

Both WSDOT and Sound Transit assert that a writ of prohibition is not available to petitioners here. WSDOT br. at 15; Sound Transit br. at 23-24. However, both agencies *misstate* what the petitioners stated in their opening brief. The petitioners never "conceded" a writ of prohibition should not issue here. Rather, petitioners observed that while many of this Court's decisions have stated that the constitutional writ of prohibition should issue if the state officer's challenged act is judicial or quasi-judicial in nature, there are *many* cases in which the writ has been issued to non-judicial officers. Br. of Pet'rs at 21 n.20. This Court's decision in *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995) is a clear example. There, the Legislature enacted a statute providing that employees of the Washington State Bar Association could unionize, and they would be subject to the jurisdiction of the Public Employees Relations Commission ("PERC"). This Court found the statute unconstitutional and issued a writ of prohibition without evaluating whether PERC was acting in a judicial or quasi-judicial capacity in investigating and administering the Bar's request concerning whether its employees "desired to be represented by a labor organization for the purpose of collective bargaining." *Id.* at 905. *See also, Andrews v. Munro*, 102 Wn.2d 761, 689 P.2d 399 (1984) (writ of prohibition issued in

original action to prevent Secretary of State from processing or certifying a proposed referendum on the taxation of timber as the referendum was unconstitutional; Secretary of State is not a judicial or quasi-judicial officer); *State ex rel. Barlow v. Kinnear*, 70 Wn.2d 482, 423 P.2d 937 (1967) (writ of prohibition issued in original action against Tax Commission restraining it from enforcing unconstitutional order to reassess property; Tax Commission is supervisory agency over property tax equalization and not a judicial or quasi-judicial agency).

In any event, given the fact that a writ of prohibition prevents a state officer from acting unconstitutionally or a writ of mandamus can prohibit a state officer from doing something that officer is under a mandatory duty to do or not do, WSDOT's and Sound Transit's argument is one of semantics.

(c) A Writ of Mandamus Is Proper

Both WSDOT and Sound Transit argue that the petitioners have not established grounds for a writ of mandamus. WSDOT br. at 15-21; Sound Transit br. at 23-27. Both argue that there is no mandatory duty present in this case. *Id.* In order to make this specious argument, both agencies must grossly mischaracterize and distort the nature of the petitioners' arguments. *See* n.14, *supra*. As noted *supra*, the issue that lies at the core of the petitioners' petition is whether WSDOT and Sound

Transit can conspire to evade the constitutional imperative of the 18th Amendment that MVF moneys cannot be used for non-highway purposes. The Governor and the WSDOT Secretary are under a *mandatory duty* from article II, § 40 of our Constitution not to expend MVF funds for non-highway purposes.[16]

Since the time of the petitioners' opening brief, this Court filed its opinion in *SEIU Healthcare 775NW v. Gregoire,* 168 Wn.2d 593, 229 P.3d 774 (2010), a case involving a writ of mandamus sought in an original action in this Court. There, the Court observed that the writ is unavailable in cases where the performance of the duties involved discretion on the part of the public officer. *Id.* Where no discretion was involved, the officer's duties were "ministerial." The Court concluded

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[16] It is certainly true that section 204(3) of the Laws of 2009, ch. 470, *mandated* that WSDOT expend $300,000 of MVF moneys to facilitate Sound Transit's light rail project, a non-highway purpose. The Legislature so stated in section 360(17) of that same legislation specifically referencing section 204:

> *The legislature is committed to the timely completion of R8A which supports the construction of sound transit's east link.* Following the completion of the independent analysis of the methodologies to value the reversible lanes on Interstate 90 which may be used for high capacity transit as directed in section 204 of this act, the department shall complete the process of negotiations with sound transit. Such agreement shall be completed no later than December 1, 2009.

(emphasis added).

Moreover, the Term Sheet, negotiated by WSDOT and Sound Transit mandating the transfer of the two center lanes of Interstate 90 to Sound Transit, AF 34, Ex. K, belies any argument that WSDOT is not under a mandatory duty to transfer a facility built with MVF money to Sound Transit for a non-highway purpose.

that although the Governor was under a mandatory duty to submit certain wage settlements in her budget under RCW 74.39A.300(1), the Governor's decisions surrounding the spending items in the budget are not ministerial and require substantial discretion, obviating the mandamus remedy. *Id.* at 599-600.

By contrast, the duty at issue here is unambiguously ministerial and mandatory in its nature. The provisions of section 204(3) of the 2009 transportation budget obligate the WSDOT to spend up to $300,000 of MVF moneys to establish a methodology to facilitate transfer of an MVF-funded facility, Interstate 90, to Sound Transit for light rail, a non-highway purpose. The duty of WSDOT's Secretary and the Governor in carrying out this legislative direction is ministerial and is not discretionary. Similarly, as evidenced by the Term Sheet, the transfer of Interstate 90 by WSDOT to Sound Transit is mandatory. Any act on the part of the Governor or the Secretary to effectuate the transfer is merely ministerial, as the agreement has been made.

Finally, and most critically, the 18th Amendment provides an overarching mandatory duty on all state officers not to spend MVF moneys on non-highway purposes. "A mandatory duty exists when a constitutional provision or statute directs a state officer to take some course of action." *Brown v. Owen*, 165 Wn.2d 706, 724, 206 P.3d 310

(2009). Where the constitution "prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment," the action is ministerial. *SEIU Healthcare*, 168 Wn.2d at 599.[17] *State officers cannot violate the Washington Constitution.* They have no discretion in that regard. A writ of mandamus is available to compel such officers to observe their sworn obligation to uphold the Constitution. In *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998), this Court issued a writ of mandamus to the Secretary of State, the State's chief elections official, directing the Secretary to undertake the clear legal duty of accepting declarations of candidacy and nominating papers, and certifying the names of incumbents for the ballot, upon declaring a term limit initiative unconstitutional.

A writ of mandamus is properly available to petitioners here, as this Court implicitly ruled in its December 4, 2009 order denying WSDOT's motion to dismiss their petition and exercising its original jurisdiction.

(d) The Dispute Here Is Justiciable

[17] Neither WSDOT nor Sound Transit has any answer to this Court's decision in *State ex rel. Burlington Northern, Inc. v. Wash. State Utils. & Transp. Comm'n*, 93 Wn.2d 398, 609 P.2d 1375 (1980). Br. of Pet'rs at 23.

WSDOT contends that the present dispute is not justiciable. WSDOT br. at 21-23. Apparently recognizing the obvious weakness of this argument, Sound Transit does not join in it.

Even under the authority cited by WSDOT, *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001), *cert. denied,* 535 U.S. 931 (2002) the test for justiciability is satisfied. Here, there is a genuine dispute between petitioners and the two agencies about whether the center lanes of Interstate 90 can be transferred by WSDOT to Sound Transit. The petitioners are taxpayers and others directly affected by the unconstitutional transfer of Interstate 90 to Sound Transit. This Court's decision on the 18th Amendment will resolve the dispute conclusively. By contrast, in *To-Ro*, the party seeking a writ was a recreational vehicle trade show challenging a statute requiring vehicle dealers and manufacturers to obtain a license. That trade show was not obligated to obtain such a license and failed to demonstrate that there were unlicensed dealers and manufacturers who would have exhibited in its Washington shows, but for the licensure statute. Its interest was therefore only theoretical.

There is no prudential reason why this Court should not issue a writ of mandamus in this case.

(2) Both WSDOT and Sound Transit Admit that Light Rail Is a Non-Highway Purpose under the 18th Amendment but Gloss Over the Implications of that Admission

Both WSDOT and Sound Transit have *conceded* that Interstate 90 was built and maintained at least in part with MVF moneys. AF 7, 9.[18] Both WSDOT and Sound Transit further *admit* that light rail is not a highway purpose under the 18th Amendment. WSDOT br. at 33; Sound Transit br. at 31. Both agencies only begrudgingly reference this Court's opinion in *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) or AGO 57-58 No. 104. Neither agency denies the anti-diversionary policy of the 18th Amendment. Br. of Pet'rs at 30-32. In fact, Sound Transit's discussion of the 18th Amendment's history, Sound Transit br. at 30-31, only confirms the Amendment's anti-diversionary policy.[19] But neither agency chooses to discuss this Court's decisions on the 18th Amendment or cases from other jurisdictions construing similar

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[18] Both WSDOT and Sound Transit assert that MVF contribution toward Interstate 90 was 14.51%. WSDOT br. at 6; Sound Transit br. at 10. That is *not* an agreed fact. *See* AF at p. 1-2. Rather, it is merely a fact buried in an addendum to the appraisal report from the appraisers selected by WSDOT and Sound Transit. AF 31, Ex. H. That reference in a report prepared by consultants selected by WSDOT and Sound Transit is untested in discovery. The important point is that MVF moneys were used to build Interstate 90.

[19] In fact, the material included in Sound Transit's appendix G from the National Highway Users Conference is telling. Sound Transit only provided a *part* of that Conference report, but Conference decried direct diversion, indirect diversion, and illicit dispersion of gas tax revenues for any purposes not associated with the use of automobiles on highways. The anti-diversionary policy was not meant simply to prevent diversion of revenues, *it was to ensure that highways would be built for automobiles.* Plainly, if facilities built with MVF moneys are easily transferred for non-highway purposes, diversion occurs. For example, Interstate 90, built in the 1960s and 1970s with federal matching dollars at 90-10, cannot be replaced in 2010 at anything comparable to that cost, adversely affecting the MVF.

provisions. They have *no answer* to the cited cases. Br. of Pet'rs at 33-45. Perhaps they hope the 18th Amendment will simply go away if they ignore it.

Sound Transit asserts that "The natural and obvious import of the framers is that motor vehicle taxes be used for highway purposes, not that highways built, in part, with motor vehicle funds be dedicated as highways forever." Sound Transit br. at 29. WSDOT claims that the transfer of the Interstate 90 center lanes is an "administrative function" expressly authorized by the 18th Amendment itself. WSDOT br. at 30-35. Both agencies read the 18th Amendment and this Court's decisions interpreting it far too generously. Under Sound Transit's analysis, the anti-diversionary policy of the 18th Amendment would be set on its head – it could be avoided on the whim of bureaucrats. Although MVF moneys could not be expended *directly* for a non-highway purpose, MVF moneys could build a highway facility, but within days or months of its construction, WSDOT could turn the facility over to an entity for a non-highway purpose for "consideration" and not violate the 18th Amendment.[20] WSDOT's argument that the 18th Amendment condones

[20] This is not an academic concern. Some people, including Seattle's mayor, want SR 520 to be built with "accommodation" for light rail. Mike Lindblom, *Council Says Move Forward on 520 Bridge, Deal with Rail Later,* Seattle *Times*, April 15, 2010. SR 520 could be built with MVF moneys with a "wink, wink – nudge, nudge" understanding that its highway lanes will be transferred to Sound Transit.

use of MVF moneys for non-highway purposes in the guise of "management" prerogatives for WSDOT is contrary to AGO 1975 No. 35 and would again give bureaucrats the ability to ignore the Constitution at their whim.

The 18th Amendment bars direct expenditures of MVF moneys for non-highway purposes, as both WSDOT and Sound Transit begrudgingly concede, but it also bars the expenditure of MVF moneys that in any fashion, no matter how minimal, facilitate a non-highway purpose. For example, in *Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959), this Court held the diversion of MVF moneys from a city street fund to an emergency fund to pay tort judgments was unconstitutional under the 18th Amendment. The Court rejected an elaborate argument by Seattle that payment of tort claims was part of the operation and maintenance of the highway system: "We are not dealing with costs and expenses as an accounting concept." *Id.* at 167. The 18th Amendment was intended "to limit expenditures from the motor vehicle fund to those things which would directly or indirectly benefit the highway system." *Id.* at 168.[21] The road system of Washington is not

[21] The language of the 18th Amendment is that MVF funds must be used *exclusively* for highway purposes. This generally means the "safety, administration, or operation of our highway system," *Automobile Club,* 55 Wn.2d at 169, not other amorphous concepts that touching upon the transportation system that only divert funds from highways. The debate over the scope of provisions like our 18th Amendment was

benefitted by allowing bureaucrats to remove functioning, needed highways at their whim. *See Washington State Highway Comm'n v. Pac. Northwest Bell Tel. Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961) (MVF expenditure for relocation of utility facilities along highway right-of-way not an exclusively highway purpose).

The fullest expression of the 18th Amendment's mandate that MVF moneys be used exclusively for highway purposes is *O'Connell*. There, the Legislature tried to "dress up" an MVF expenditure for a public transportation plan that included rail as an action for the betterment of highways. 75 Wn.2d at 555-56. The Legislature appropriated money from the MVF for a study that included planning, engineering, financial, and feasibility studies. This Court stated that the Legislature "cannot change the real nature and purpose of an act by giving it a different title or by declaring its nature and purpose to be otherwise." *Id.* at 563. The Court stated:

> The appellant urges that, because the legislature has declared that the appropriation is to be used for the purposes of benefiting the highways of the state, this court should assume that there is a factual basis for this declaration. This assumption alone does not render the act constitutional. We have noted the incidental benefits which will accrue to the highway system if Metropolitan Seattle

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encapsulated in the Oregon decisions referenced in the petitioners' opening brief at 43-45, rejecting an argument that a project "facilitated" traffic flow. The broad anti-diversionary policy of the 18th Amendment commands that "highway purposes" in that Amendment be narrowly construed.

> establishes a comprehensive system of public transportation, but the appellant does not suggest that there were any other benefits which the legislature had in mind when it voted the appropriation. These benefits, we have held, do not change the purpose of the expenditure from that of a public transportation purpose to that of a highway purpose.

*Id.* at 562. In effect, the *O'Connell* court held that an expenditure that *facilitates* a non-highway purpose violates the 18th Amendment just as if the dollars were spent directly on a non-highway purpose. Moreover, legislative efforts to cast the expenditure as one benefitting highway purposes will be disregarded by the courts if the purpose is clearly non-highway in nature.

The Attorney General's office has similarly construed the 18th Amendment to prohibit not only direct expenditures of MVF moneys for non-highway purposes but also any actions that facilitate non-highway purposes. In AGO 57-58 No. 104, the Attorney General addressed a situation where WSDOT was proposing wider medians on Interstate 5 (then in the planning stage) to "provide sufficient median width to accommodate a rapid rail transit system on the highway right of way." The Attorney General was specifically asked if MVF moneys could participate in the purchase of expanded rights of way that might be used for rail transportation. The Attorney General was also asked if the State could acquire the rights of way and undertake construction of the highway

so that construction of a rapid transit system could still take place on the right of way. The answer to the first question was no, and the Attorney General stated that the answer to the first question controlled the answer to the second:

> In the situation at hand the purchase of the extra right of way would not serve any highway purpose, since such right of way would be exclusively for the rapid rail transit system. Therefore, it is the opinion of this office that expenditure of motor vehicle funds for the purchase of additional right of way in order for a rapid rail transit system to be built upon the median strip would constitute an expenditure of motor vehicle funds in violation of Amendment 18 of the Washington state constitution.

Clearly, the Attorney General concluded that not only could the MVF moneys not be expended *directly* for a non-highway purpose under the 18th Amendment, they could not be spent in a fashion that *indirectly* benefits a non-highway purpose, just as WSDOT proposes to do here by transferring the Interstate 90 center lanes to Sound Transit.

In AGLO 1975 No. 35, the Attorney General was asked about the funding source for the then-proposed WSDOT. The Attorney General stated that the MVF could fund the administrative functions of WSDOT that related to highway purposes under the 18th Amendment, but further concluded "those management services which are not related to highway purposes would have to be funded in some other manner [than the MVF]." Indeed, WSDOT would be required to segregate its highway and non-

highway purposes "so as to insure that motor vehicle funds are only used for departmental costs in conjunction with highway purposes." WSDOT could not commingle funds "as to prevent an accurate audit of all aspects of its operation designed to insure, inter alia, full compliance with the requirements of the 18th Amendment..."

In sum, the 18th Amendment is not as narrow in its scope as WSDOT and Sound Transit contend. WSDOT cannot blithely ignore its anti-diversionary policy by transferring still viable highway facilities to another for a non-highway purpose. WSDOT cannot do indirectly what the 18th Amendment directly prohibits.

(3) WSDOT and Sound Transit Erroneously Argue that Bureaucrats Can Trump the 18th Amendment and Lease MVF-Funded Highway Facilities for Non-Highway Purposes at Their Whim

Just as predicted in the petitioners' opening brief at 45-50, both WSDOT and Sound Transit now argue that WSDOT has *complete* discretion to ignore the anti-diversionary policy of the 18th Amendment by transferring viable highway facilities built with MVF moneys to another for non-highway purposes. WSDOT did not plead statutory grounds as a justification for violation of the 18th Amendment, WSDOT answer at 10-11, although it did raise statutory grounds as a justification for violating

the 18th Amendment. WSDOT motion at 14-15.[22] Sound Transit goes so far as to argue that WSDOT need not even comply with the statutes relating to sale or lease of highway facilities. Thus, to a greater or lesser degree, both agencies argue that WSDOT can ignore that a highway facility was constructed with MVF moneys and it can sell, lease, or transfer such a facility at its whim. This analysis would effectively gut the anti-diversionary policy of the 18th Amendment and should not be tolerated by this Court.

Sound Transit now concedes that the sale of the two center lanes is not contemplated. Sound Transit br. at 41. Thus, RCW 47.12.063 relating to the sale of surplus highway property does not apply.

WSDOT falls back on three statutes, RCW 47.12.080, RCW 47.12.120, and RCW 47.12.283 to sustain its position that it can "lease" the center lanes to Sound Transit. WSDOT br. at 19-20, 31 n.8. But in relying on those statutes, WSDOT does not discuss their actual provisions and instead relies on a mistaken overarching principle that it can act without the restraint of the 18th Amendment as a "management" prerogative, WSDOT br. at 30-36, and then applies an erroneous "standard

[22] Ironically, in light of WSDOT's groundless argument that petitioners' argument has "changed," WSDOT's unpleaded statutory justification for its violation of the 18th Amendment has morphed. It adds other statutes in its brief not discussed in its motion to dismiss.

of review" for its conduct that is completely deferential to its actions, ignoring the mandate of the 18th Amendment. WSDOT br. at 20 n.4.

Sound Transit similarly argues that WSDOT has the authority to lease the center lanes, but WSDOT's authority is disconnected from the requirements of any specific leasing statute so long as the transfer is supported by "consideration." Sound Transit br. at 40. Further, Sound Transit claims that the general WSDOT leasing statute, RCW 47.12.120 does not apply, and RCW 47.52.090 and RCW 47.52.180 (*never before pleaded or argued by Sound Transit*) authorizes the lease of the center lanes. Sound Transit br. at 40-47.

The upshot of the arguments by WSDOT is that it may ignore the 18th Amendment at its whim and transfer highway facilities still being used for highway purposes to another for a non-highway purpose without reference to the 18th Amendment or RCW 47.12.120. Such a cavalier attitude toward the Constitution and statutes is plainly wrong and should be rejected by this Court.

(a) Standard of Review

Consistent with its argument that bureaucrats can ignore the 18th Amendment, WSDOT argues for a standard of review for any agency decision to sell or lease highway facilities that is *completely* deferential to WSDOT, ignoring the fact that the Constitution is at issue. WSDOT br. at

20 n.4. The case cited by WSDOT is inapt. In *State ex rel. Agee v. Superior Court*, 58 Wn.2d 838, 365 P.2d 16 (1961), the question at issue was exceedingly narrow and a poor platform from which to establish a standard of review here. In *Agee*, the Legislature required one hundred feet as the standard width for primary state highways unless the director of highways for good cause set another width. This Court observed that because the Legislature did not provide for a public hearing, the director's decision was not reviewable except for fraud or gross abuse of discretion. In the face of an argument that road signs and lighting in the margin of a highway were not a "highway purpose," the Court noted that not all of a right of way need be devoted to travel lanes, but its use for signs and lighting was still a highway purpose.

Such a minor, technical decision is not at issue here, where the 18th Amendment's mandate that MVF moneys be used for highway purposes is at stake. WSDOT cannot cavalierly claim that an 18th Amendment-funded facility is no longer needed for highway purposes when that statement is patently untrue. As noted in the petitioners' opening brief at 47 n.32, any WSDOT authority to dispose of facilities must be construed with the anti-diversionary policy of the 18th Amendment in mind. Where an agency's interpretive rules are contrary to law, the agency's actions are not entitled to *any* deference. *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122,

127, 814 P.2d 626 (1991). Similarly, in this case, WSDOT's decision which is in violation of the 18th Amendment merits no deference by this Court.

(b) The Statutes Cited by WSDOT and Sound Transit Do Not Authorize the Lease of a Viable Highway Facility for a Non-Highway Purpose

Both WSDOT and Sound Transit appear to contend that the 18th Amendment can be satisfied if facilities built with 18th Amendment funds are sold or leased and the MVF receives some "consideration" for the sale. WSDOT br. at 39-40; Sound Transit br. at 31-38. This argument is curious on several levels.

First, both agencies tacitly *admit* that the transfer of a facility built with MVF moneys has 18th Amendment implications. They *concede* that the 18th Amendment prevents WSDOT from building a facility with MVF moneys and then selling or leasing it to another for a non-highway purpose.

Second, their argument also appears to be that legal "consideration," as opposed to fair market value, is enough to "cure" the unconstitutional transfer of a facility built with 18th Amendment funds to another for non-highway purposes. Leaving aside the economic reality of inflation in construction costs, the need to acquire necessary rights of way, and the obvious difficulty in siting and erecting highway projects of which

Interstate 90 in the 1960s and 1970s was an emblem, petitioners vigorously disagree that the agencies here can disregard the 18th Amendment by merely paying a few dollars for a vital highway facility, ignoring the statutes governing the sale or lease of facilities built with MVF resources. The action contemplated by WSDOT and Sound Transit here is no different than if funds were appropriated directly from the MVF for light rail, a non-highway purpose per *O'Connell*.

(i) RCW 47.12.120

The principal statute authorizing the lease of properties no longer needed for highway purposes is RCW 47.12.120. As indicated in the petitioners' opening brief at 48-50, this statute does not come into play because Interstate 90 is *not surplus*.

WSDOT does not bother to even address the express statutory language of RCW 47.12.120,[23] apparently claiming that because the 1976 MOA made reference to a conversion of some portion of Interstate 90 at some indefinite time in the future to "fixed guideway," it was exempted from compliance with the statute. WSDOT br. at 20-21. Indeed, WSDOT asserts that because the 18th Amendment makes reference to the fact that

[23] Instead, it makes the grandiose assertion that if it was required to comply with the law, that "would run contrary to years of leasing state highway property under RCW 47.12 and RCW 47.56." WSDOT br. at 31 n.7. WSDOT does not point to any evidence supporting this claim. Moreover, it is troubling that WSDOT has for so long ignored the 18th Amendment and state law.

MVF funds can be spent for "the administration of public highways," it can dispose of facilities built with 18th Amendment funds at its complete discretion pursuant to its "management authority" without regard to the sale or lease statutes enacted by the Legislature. WSDOT br. at 30-36. WSDOT acknowledges statutes pertaining to the lease of facilities, but does not address how they were met here. WSDOT br. at 31 n.8.

Sound Transit contends that WSDOT need not comply with the 18th Amendment so long as the MVF is "repaid." Sound Transit br. at 27-28. It cites AGLO 1975 No. 62 and AGOs from other jurisdictions,[24] for this proposition. Sound Transit br. at 33-38. Ultimately, it concludes RCW 42.17.120 is inapplicable because "more specific" statutory provisions apply, Sound Transit br. at 41, statutory provisions *never pleaded before* by Sound Transit.

Both WSDOT and Sound Transit ignore the language of RCW 47.12.120 because it prevents them from doing what they want to do here. That statute only permits the lease of land, improvements, or air space used for highway purposes, if such land and improvements "are not presently needed [for highway purposes.]" *See* WAC 468-30-110(7) ("No use of such [air space] shall be allowed which ... impairs the use of the

[24] If, as noted in petitioners' brief at 31 n.26, that *Washington* Attorney General opinions carry some weight, foreign AGOs should offer little persuasive authority for this Court.

facility for highway purposes."). Here, the transfer not only "impairs" the use of the center lanes, it displaces all general highway traffic from those center lanes.

Neither RCW 47.12.120 or WAC 468-30 allow WSDOT to transfer the center lanes of Interstate 90 to Sound Transit. WSDOT cannot stand before this Court and argue in good faith that Interstate 90 is *surplus, or no longer needed for highway purposes.* AGO 51-53 No. 376; RCW 47.12.063 (sale of *surplus* property).[25] AGO 1975 No. 62, upon which both agencies rely, touched only upon the question of the consideration for the transfer of surplus highway property, and not the circumstances under which the property is no longer needed for highway purposes. But again, given the anti-diversionary purpose of the 18th Amendment, this is a vital question in the interpretation of the statute that cannot be ignored by WSDOT. Indeed, Laws of 1937, ch. 53, § 28 spoke in terms of the property being *useless*, before its conveyance was permitted. WSDOT br. at 35 n.15.

[25] Although both WSDOT and Sound Transit now concede that RCW 47.12.063 does not apply here, it is clear that statute is only applicable if a property is *surplus*, no longer needed for transportation purposes, as petitioners asserted in their brief at 47-48. *See South Tacoma Way LLC v. State*, 146 Wn. App. 639, 651, 191 P.3d 938 (2008), *review granted*, 165 Wn.2d 1036 (2009) ("... by enacting RCW 47.12.063, there is no question that the legislature gave DOT authority to determine when it no longer needs property under its jurisdiction for transportation purposes and to sell that surplus property at its fair market value or greater for the benefit of the state's motor vehicle fund.").

As long ago as 1964, this Court held that there must be an adequate showing by WSDOT that lands were not required for highway purposes before such lands could be transferred. In *Sperline v. Rosellini*, 64 Wn.2d 605, 392 P.2d 1009 (1964), the Court held that the Highway Commission could not transfer lands in Douglas County acquired by the Commission for highway purposes to the Parks and Recreation Commission for a park. The only person who testified before the Highway Commission was the district engineer for the area in which the land was located who "testified that the lands had not been declared surplus." *Id.* at 606. A legislative authorization to transfer the lands was insufficient to establish that the lands were surplus, not needed for highway purposes. This Court upheld the trial court's order restraining the transfer.

Neither agency offers a serious argument that the two center lanes of Interstate 90 are surplus. Those lanes *are* needed for highway purposes. RCW 47.12.120 is not met by WSDOT or Sound Transit.

(ii) RCW 47.12.080

WSDOT, but not Sound Transit, makes passing reference to RCW 47.12.080 as a justification for the transfer of Interstate 90's center lanes. WSDOT br. at 19, 31 n.8, 39 n.17. This is a statute authorizing the *sale* of property. But far from supporting WSDOT's contention that this statute confers "discretion" on WSDOT to transfer the center lanes, it does not.

WSDOT does not analyze the actual statutory language. Before a sale can occur, the property must be *unused.* Obviously, the center lanes of Interstate 90 are *used.*

(iii) RCW 47.12.283

WSDOT, and again not Sound Transit, contends that RCW 47.12.283 supports its discretion to transfer the two center lanes of Interstate 90. WSDOT br. at 20, 31 n.8, 39 n.17. But again WSDOT *ignores* the actual language of the statute. It is a sale statute. The authority to sell is only available to WSDOT if the land is no longer required for highway purposes, notice is given to various interested parties, including abutting property owners, and a public auction is conducted. *See South Tacoma Way, LLC, supra.*

(iv) RCW 47.52.090/47.52.180

For the very first time in this case, both WSDOT and Sound Transit assert that RCW 47.52.090 authorizes WSDOT to transfer the two Interstate 90 center lanes to Sound Transit. WSDOT br. at 6, 32, 36; Sound Transit br. at 42-44. Neither agency pleaded this statute. WSDOT did not argue it in its motion to dismiss. For this reason alone, the Court should disregard the argument.

On the merits, RCW 47.52.090 does not apply here to permit WSDOT to ignore the mandate of the 18th Amendment that the MVF

cannot be used to facilitate or support a non-highway purpose. Sound Transit appears to contend that WSDOT could enter into an agreement authorized by RCW 47.52.090 and use 18th Amendment funds to plan, finance, and construct light rail, a non-highway purpose, on limited access facilities. To the extent that RCW 47.52.090 does so, it violates the 18th Amendment, as this Court determined in *O'Connell*. As this Court cogently observed in the *Pacific Northwest Bell Telephone Co.* decision:

> The constitution does not grant the legislature the power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision. Nor does the Eighteenth Amendment, which refers directly to this subject, grant such authority to the legislature.

59 Wn.2d at 222. In other words, the Legislature could not enact a statute to permit WSDOT to enter into contracts for an illicit, unconstitutional purpose. Light rail is a non-highway purpose, as both WSDOT and Sound Transit *concede* after *O'Connell*. RCW 47.52.090 does not permit them to contract for the illicit expenditure of MVF moneys to support such a non-highway purpose; the Legislature cannot authorize them to contractually ignore the 18th Amendment.

Both agencies cite *Peden v. City of Seattle*, 9 Wn. App. 106, 510 P.2d 1169, *review denied*, 82 Wn.2d 1010 (1973) as supporting their interpretation of RCW 47.52.090. It does not. The Court of Appeals there concluded that certain entrance and exit ramps could be dedicated to

buses. Such activities constituted a highway purpose under the 18th Amendment as buses are motor vehicles operating on the highways.[26] But the opinion is not a picture of clarity as it does not directly analyze the 18th Amendment. To the extent that *Peden* stands for the proposition that the Legislature can exercise "police power" in enacting RCW 47.52.090 so as to circumvent the 18th Amendment, it is contrary to *Pacific Northwest Bell Telephone Co.* and should be overruled.

Finally, Sound Transit references RCW 47.52.180, a statute pertaining to challenges to the citing of limited access highways, as somehow trumping RCW 47.12.120. Sound Transit br. at 44-45. This is again the *first time* that Sound Transit has raised the statute in the case. *Nothing* in RCW 47.52.180 provides that the process envisioned by RCW 47.52.131-.190[27] somehow trumps statutes pertaining to the disposition or lease of surplus properties by WSDOT. No mere statute, of course, can override the 18th Amendment in any event.

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[26] In AGLO 1976 No. 76, 1976 WL 168496, even the Attorney General clearly understood the 18th Amendment limits the ability of governments in Washington to contract for use of transportation facilities. There, the Attorney General opined that while a public transportation benefit area may contract for the construction of a transit-only roadway and access ramp under provisions similar to RCW 47.52.090, its ability to construct passenger terminal and parking facilities was constrained by the 18th Amendment.

[27] That process is discussed generally in AGLO 1972 No. 72, 1972 WL 122954, and in *Seattle Bldg. & Constr. Trades Council, supra.*

In sum, both WSDOT and Sound Transit seek to obscure the only statute that could conceivably apply to authorize WSDOT to lease the two center lanes of Interstate 90, RCW 47.12.120. *They do so because they both know that they cannot meet its terms.* Instead, they misrepresent the petitioners' position[28] and concoct an elaborate argument to give them the unrestrained authority to ignore the 18th Amendment at their whim. This Court should reject WSDOT's and Sound Transit's flimsy rationale.

(4) WSDOT Cannot Expend $300,000 in MVF Moneys to Facilitate Light Rail, a Non-Highway Purpose under the 18th Amendment

Both WSDOT and Sound Transit contend that WSDOT may expend up to $300,000 to facilitate the transfer of the center lanes of Interstate 90 to Sound Transit for light rail, a purpose they both concede is non-highway in nature under the 18th Amendment. WSDOT br. at 37-41; Sound Transit br. at 38-39. They contend that relief is unavailable to the petitioners either because the money was already spent, the expenditure merely determined "how much to repay the Motor Vehicle Fund, not to fund any portion of the plan to construct light rail," Sound Transit br. at

[28] Far from arguing that a facility built with 18th Amendment moneys can never be sold or leased, as WSDOT and Sound Transit erroneously claim, WSDOT br. at 31-32, 34; Sound Transit br. at 27-28, 31, petitioners believe such facilities may be sold or leased, pursuant to statute, if they are surplus, no longer needed for highway purposes, and fair market value of the facilities is recovered for the MVF. Neither WSDOT nor Sound Transit can argue with a straight face that Interstate 90's center lanes are no longer needed for highway purposes.

39, or the expenditure was a "benefit" to the highway system. WSDOT br. at 37. The agencies' arguments are sophistry.

First, if the MVF moneys are spent on an unconstitutional purpose, this Court can still provide relief. If it were otherwise, agencies expending funds for unconstitutional purposes could avoid constitutional mandates by rapid commitments of funds to an illicit purpose. An unconstitutional expenditure does not morph into a legitimate one merely because an agency got the funds out the door of the State Treasury quickly. For example, in *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973), this Court granted a writ of prohibition preventing state officers from providing public funds to K-12 and college students in parochial schools as a violation of article IX § 4 of our Constitution and the First Amendment to the United States Constitution *even though certain funds had been disbursed by the affected state officials*. *Id.* at 223. *See also, Covell v. City of Seattle,* 127 Wn.2d 874, 905 P.2d 324 (1995) (Seattle imposed a street utility "fee," but taxpayers were still entitled to refund of unconstitutional tax).

Second, at its core, the appropriation in the 2009 transportation budget was designed to facilitate the transfer of the two center lanes of Interstate 90 to Sound Transit for light rail, an unconstitutional purpose. As the *Weiss* court observed, there is no such thing as a "de minimis"

constitutional violation, *id.* at 206, and "indirect" or "incidental" activities are just as unconstitutional as "direct" actions in violation of Washington's Constitution. *Id.* at 207. In *O'Connell*, the illicit expenditure of MVF moneys was not directly for the construction of rail transportation. It was for a study of rail transportation as an aspect of a comprehensive plan, an indirect support of a non-highway purpose. *O'Connell*, 75 Wn.2d at 555-56. Even the indirect support of light rail with the appraisal expenditure in the 2009 transportation budget offends the 18th Amendment.

WSDOT asserts that *State ex rel. Wash. State Highway Comm'n v. O'Brien*, 83 Wn.2d 878, 523 P.2d 190 (1974) supports its position. It does not. The key fact that distinguishes *O'Brien* from the present case is that the appraisal at issue there was for a *highway purpose*. *Id.* at 883. Facilitation of a highway purpose, unlike a non-highway purpose like light rail, does not violate the 18th Amendment.

This Court should bar WSDOT's expenditure of MVF moneys to facilitate a non-highway purpose.

(5) Petitioners Are Entitled to Their Attorney Fees under the Common Fund Exception

Washington follows the American Rule concerning attorney fees and litigation expenses, *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996), but a recognized equitable exception to this rule allows fee

awards in cases where litigants preserve or create a common fund for the benefit of others as well as themselves. *Covell*, 127 Wn.2d at 891.

The common fund exception applies to public funds created or preserved by the litigant. *Weiss v. Bruno*, 83 Wn.2d 911, 912, 523 P.2d 915 (1974). Additionally, the common fund exception has been applied in Washington even when no direct monetary benefit was obtained. *See Grein v. Cavano*, 61 Wn.2d 498, 379 P.2d 209 (1963). Furthermore, there need not be an identifiable existing fund under control or in the registry of the court. *Weiss* at 914. In *Weiss*, this Court granted writs of prohibition against the disbursement of state funds as authorized by two legislated acts and found the challenged statutes, which involved state financial aid to certain categories of students, were unconstitutional. The petitioners then requested the allowance of reasonable attorney fees. The Court noting that the actions of the petitioners not only benefitted all taxpayers by halting the unlawful disbursement of taxpayer funds under an unconstitutional statute, but also protected the constitutional rights of all citizens to the separation of church and state. *Id.* at 914, 523 P.2d 915. The Court formulated a rule authorizing the recovery of a reasonable attorney fee where the court is presented with:

> (1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to patently unconstitutional legislative and administrative

> actions (4) following a refusal by the appropriate official and agency to maintain such a challenge.

*Id.* at 914. Under those circumstances, the common fund principle allowed the petitioners to recover their fees. *Id. See also, Covell*, 127 Wn.2d at 892 (taxpayers who successfully challenged unconstitutional tax entitled to fees under common fund exception).

*Weiss* and *Covell* control here. If the Court grants the writ, petitioners are entitled to attorney fees as they have successfully challenged the expenditure of public funds made pursuant to patently unconstitutional legislation. Like the petitioners in *Weiss*, the litigants in this case also seek to protect the constitutional rights of the taxpayers and citizens of Washington. Thus, the petitioners are entitled to recover their reasonable attorney fees here.

## D. CONCLUSION

For the reasons articulated above, nothing in the briefs of respondents WSDOT or Sound Transit should dissuade this Court from issuing a writ in this original action. The State's expenditure of funds under § 204(3) of the transportation budget and the proposed transfer of the two center lanes of Interstate 90 to Sound Transit violate article II, § 40 of the Washington Constitution.

This Court should issue a writ of mandamus or prohibition preventing Governor Gregoire or WSDOT's Secretary from expending MVF moneys for the non-highway purpose of § 204(3) of the 2009 transportation budget and from transferring any portion of Interstate 90 to Sound Transit for the purpose of its East Link Project.

Costs in this case, including reasonable attorney fees, should be awarded to petitioners. RAP 16.2(g).

DATED this 23d day of June, 2010.

Respectfully submitted,

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